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PENDAFTAR HAKMILIK, PEJABAT PENDAFTARAN WILAYAH PERSEKUTUAN KUALA LUMPUR & ANOR v. POH YANG HONG

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
B HASAN LAH FCJ
RAMLY ALI FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 01(f)-59-12-2015(W)]
11 OCTOBER 2016

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LAND LAW: *Registrar of Titles – Statutory duties – Whether to maintain proper register of all lands caused to be registered at Registry – Whether to ensure that records and particulars in Register of Titles correct and accurate – Registering same land under two different title numbers and two different owners – Whether in breach* D *of statutory duty – Whether guilty of negligence at common law – National Land Code, ss. 22, 384, 385, 386*

LAND LAW: *Registrar of Titles – Statutory duties – Breach – Maintenance of records in Registrar of Titles – Inaccurate records – Incorrect and inaccurate records relied upon by purchaser in purchase of land resulting in losses – Whether Registrar* E *of Titles owed duty of care to purchaser – Whether guilty of negligence at common law – Whether liable in damages – Whether only liable in damages if purchaser made and relied on 'an official search' as against 'a private search' – National Land Code, ss. 22, 384, 385, 386*

F ***TORT:*** *Negligence – Breach of statutory duty – Damages – Whether common law duty of care could arise in performance of statutory function*

The respondent ('the plaintiff') lost a sum of RM4,451,160 when the piece of land that he had purchased from a vendor ('the property') turned out to belong to a third party instead. The plaintiff had, prior to the purchase, G conducted a private search *vis-à-vis* the property at the relevant Land Registry, and had only proceeded with the purchase after finding that the said vendor was the registered proprietor of the property. The undisputed facts, however, showed that the particulars in respect of the property in the Register of Titles as maintained by the Registrar of Titles ('second defendant') were inaccurate, whereof the property was, in fact, registered H under two different title numbers and two different proprietors. The plaintiff filed an action, *inter alia*, against the second defendant and the Government of Malaysia ('third defendant') alleging that, they had: (i) breached their duty of care to him; (ii) committed the tort of negligence; and (iii) were liable in damages for the losses he suffered. The High Court allowed the claim and I stated in particular that, in so far as the defendants' duty of care to a paying member of the public is concerned, there was no difference between a 'private search' and an 'official search' (illustrated in ss. 384 and 385 of the National Land Code ('NLC') respectively). On appeal, the decision was

affirmed by the Court of Appeal who observed, in respect of ss. 384 and 385 of the NLC, that the apparent difference between the two sections was of little relevance as the cause of action was on the failure to ensure the correctness of the particulars in the Register of Titles, and not the accuracy of what was printed on a private or official search. The defendants appealed further and posed the following question to the Federal Court, *viz*: 'in an action for negligence premised on the cause of action of the failure on the part of the Land Administrator to ensure the particulars in the Register of Titles are accurate, is the difference between ss. 384 and 385 of the National Land Code of any relevance?'. The primary issues that arose were: (i) whether the courts below ought to consider the nature of the search thus made by the plaintiff in determining whether the second defendant owed a duty of care to the plaintiff; and (ii) whether, in any case, a duty of care on the part of the second defendant could only arise upon the plaintiff submitting an 'official search' to the second defendant and not otherwise.

Held (dismissing appeal; declining to answer question)
Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) A common law duty of care could arise in the performance of a statutory function. The Land Administrator and the third defendant owed a duty of care to ensure that when searches are made by members of the public at the Land Registry, they would be acting on accurate information and a properly maintained and accurate Register of Titles. Their duty of care in the context of the present case is two-fold. Firstly, there is the statutory duty under the NLC to maintain the register of all lands caused to be registered at the Registry, and in particular to ensure that the information contained in the Register is correct, true and accurate and reflects the true and actual description of the title to the land as well as the true identity of the registered proprietor thereof. Secondly, there is the common law duty of care whereupon there can be a claim for negligence for the same alleged wrong. (paras 31, 35 & 37)

(2) There has been a breach of the statutory duty imposed on the second defendant Land Administrator/Registry for its negligence in the manner in which it had maintained its record resulting in the loss to the plaintiff. Administrative shortcomings amounting to negligence and breach of duty could not absolve the Land Administrator from a claim of damages suffered by an aggrieved party who relied on the accuracy of the records maintained at the Land Registry. (paras 28 & 35)

(3) There is a clear distinction between a claim for compensation provided under s. 386 of the NLC, and a claim for damages under the common law for an act of negligence by the second defendant in its maintenance of the records of the Register of Titles. In the present case, the plaintiff's claim in the matter is simply for damages under the common law and

A not for relief of compensation under s. 386 of the NLC. The High Court Judge was hence correct in concluding that the second defendant was liable and owed a duty of care to the plaintiff in the circumstances of the case. (paras 32 & 33)

B **(4)** There can be no difference between a 'private search' and an 'official search' as provided for under the NLC insofar as it relates to the issue of liability arising from a common law claim of damages for the negligent act of the second defendant in its maintenance of the records of the Register of Titles. There is also nothing in ss. 384 and 385 of the NLC that excludes the liability of the second defendant from a common C law claim of the tort of negligence. For the reasons adumbrated, it is not necessary for this court to answer the sole question posed. (paras 39 & 40)

(5) The intended protection accorded to the second defendant under s. 22 of the NLC is for a wholly different set of circumstances. The existence D of two sets of record of title under two different persons as the registered owners of the same property without reasonable explanation definitely will not qualify to be an act done in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under the Act. (para 30)

E ***Bahasa Malaysia*** *Headnotes*

Responden ('plaintif') mengalami kerugian sebanyak RM4,451,160 apabila sebidang tanah yang dibelinya ('hartanah') daripada seorang penjual didapati kepunyaan satu pihak ketiga dan bukan milik penjual tersebut. Sebelum F membeli hartanah, plaintif telah membuat carian persendirian di Pejabat Tanah mengenai hartanah, dan hanya membelinya setelah mendapati si penjual terdaftar sebagai pemilik hartanah di dalam Daftar Hakmilik. Walau bagaimanapun, fakta yang tidak dipertikai menunjukkan bahawa butiran hartanah dalam Daftar Hak Milik yang dijaga oleh Pendaftar Hakmilik ('defendan kedua') tidak tepat, di mana hartanah telah didaftar di bawah dua G nombor hak milik dan dua pemilik berbeza. Plaintif memfail tindakan antara lain terhadap defendan kedua dan Kerajaan Malaysia ('defendan ketiga'), sambil mendakwa bahawa mereka telah: (i) melanggar kewajipan berjaga-jaga terhadapnya; (ii) melakukan tort kecuaian; dan (iii) bertanggungan untuk mengganti kerugian yang dialaminya. Mahkamah Tinggi membenarkan H tuntutan dan secara khusus menyatakan bahawa, setakat yang berkaitan dengan kewajipan berjaga-jaga defendan kedua terhadap orang awam yang membayar, tiada perbezaan antara 'carian persendirian' dan 'carian rasmi' (masing-masing tertera dalam ss. 384 dan 385 Kanun Tanah Negara ('KTN')). Di rayuan, keputusan telah disahkan oleh Mahkamah Rayuan, I yang menyatakan, berkaitan ss. 384 dan 385 KTN, bahawa perbezaan yang kelihatan pada kedua seksyen tersebut adalah tidak relevan memandangkan kausa tindakan adalah terhadap ketepatan butiran dalam Daftar Hak Milik, dan bukannya terhadap ketepatan apa yang tertulis pada carian persendirian

atau carian rasmi. Defendan-defendan merayu lagi dan seterusnya mengajukan soalan berikut kepada Mahkamah Persekutuan, iaitu: 'dalam satu tindakan kecuaian yang diasas pada kausa tindakan yang berpaksi pada kegagalan Pentadbir Tanah menentukan butir-butir di dalam Daftar Hak Milik adalah tepat, adakah perbezaan yang wujud antara ss. 384 dan 385 Kanun Tanah Negara relevan?'. Isu penting yang berbangkit adalah: (i) sama ada mahkamah di bawah sepatutnya menimbang bentuk carian yang dibuat oleh plaintif apabila memutuskan sama ada defendan kedua mempunyai kewajipan berjaga-jaga terhadap plaintif; dan (ii) walau apapun, sama ada kewajipan berjaga-jaga pihak defendan kedua hanya berbangkit apabila plaintif membuat 'carian rasmi' dan bukan sebaliknya.

Diputuskan (menolak rayuan; enggan menjawab soalan yang dikemukakan)

Oleh Zulkefli Ahmad Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Satu kewajipan berjaga-jaga boleh berbangkit dalam pelaksanaan tugas statutori. Pentadbir Tanah dan defendan ketiga di sini mempunyai kewajipan berjaga-jaga memastikan bahawa apabila carian dibuat di Pejabat Tanah oleh orang awam bahawa mereka boleh bergantung pada maklumat-maklumat yang tepat dan pada Daftar Hak Milik yang tepat dan dijaga dengan baik. Kewajipan berjaga-jaga mereka dalam konteks kes ini adalah dua serangkai. Pertama ialah tanggungjawab statutori di bawah KTN untuk menjaga daftar semua tanah yang didaftar di Pejabat Tanah, terutama untuk menentukan bahawa maklumat-maklumat yang terkandung di situ adalah betul, tepat dan benar serta memberi gambaran sebenar mengenai hak milik tanah dan identiti pemilik. Kedua ialah kewajipan berjaga-jaga di sisi common law di mana tuntutan kecuaian akan berbangkit jika berlaku pelanggaran terhadapnya.

(2) Pelanggaran telah berlaku terhadap kewajipan berjaga-jaga yang dikenakan atas defendan kedua Pentadbir Tanah/Pejabat Tanah disebabkan kecuaian dalam mengendali dan menjaga rekodnya yang sekaligus menyebabkan kerugian pada plaintif. Kelemahan-kelemahan pentadbiran yang berbentuk kecuaian dan pelanggaran tanggungjawab tidak boleh melepaskan Pentadbir Tanah daripada tuntutan ganti rugi oleh orang yang terkilan, yang bergantung pada kebenaran rekod yang dijaga di Pejabat Tanah tersebut.

(3) Terdapat perbezaan jelas antara tuntutan pampasan di bawah s. 386 KTN dan tuntutan ganti rugi di bawah common law yang berbangkit daripada perbuatan cuai defendan kedua dalam penjagaan rekod Daftar Hak Milik. Dalam kes semasa, tuntutan plaintif adalah untuk ganti rugi di bawah common law dan bukannya untuk relif di bawah s. 386 KTN. Oleh itu, hakim Mahkamah Tinggi betul dalam memutuskan bahawa defendan kedua dalam hal keadaan kes adalah bertanggungan dan mempunyai kewajipan berjaga-jaga terhadap plaintif.

A **(4)** Tidak harus wujud apa-apa perbezaan antara 'carian persendirian' dan 'carian rasmi' seperti yang diperuntukkan oleh KTN setakat yang berkaitan dengan isu liabiliti yang berbangkit daripada tuntutan ganti rugi common law terhadap perlakuan cuai defendan kedua dalam cara menjaga rekod Daftar Hak Milik. Begitu juga, tiada apapun dalam
B ss. 384 dan 385 KTN yang mengecualikan defendan kedua daripada liabiliti atas tindakan ganti rugi kerana tort kecuaian. Atas alasan-alasan yang dikemukakan, tiada keperluan bagi mahkamah ini untuk menjawab soalan tunggal yang diajukan.

(5) Perlindungan yang hendak diberi oleh s. 22 KTN kepada defendan
C kedua adalah untuk satu keadaan yang sama sekali berbeza. Kewujudan dua set rekod hak milik di bawah dua nama yang berbeza sebagai pemilik berdaftar bagi tanah yang sama, tanpa penjelasan munasabah, tentunya tidak melayakkannya sebagai satu tindakan suci hati atau satu tindakan dalam melaksanakan suatu kuasa, atau suatu tanggungjawab
D yang diberikan kepadanya atau dikenakan atasnya di bawah Akta.

Case(s) referred to:
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC ***(refd)***
Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(aff)***
E *X (Minors) v. Bedfordshire County Council [1995] 3 WLR 152* ***(refd)***

Legislation referred to:
National Land Code, ss. 22, 384, 385, 386

For the appellant - Narkunavathy Sundareson & Azza Azmi; SFCs
F *For the respondent - N Chandran, V Vijakumar & Choi Kian You; M/s Albar & Partners*

[Editor's note: For the Court of Appeal judgment, please see Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2015] 6 CLJ 740 (affirmed).]

G *Reported by Wan Sharif Ahmad*

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

Introduction

H

[1] This is an appeal by the appellants against the decision of the Court of Appeal in affirming the decision of the High Court in allowing the respondent's claim against the appellants for damages premised on the tort of negligence on the part of the first appellant.

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[2] Before the High Court the respondent, Poh Yang Hong was the plaintiff. The Pendaftar Hakmilik, Wilayah Persekutuan, Kuala Lumpur, the first appellant herein was the second defendant and the Government of Malaysia, the second appellant was the third defendant in the High Court. The first defendant at the High Court was the vendor with whom the plaintiff had entered into a sale and purchase agreement to purchase the property. We shall refer to the parties as they were before the High Court.

Background Facts

[3] The relevant background facts of the case are these. The plaintiff entered into a sale and purchase agreement with one Ng Lai Yin, the first defendant to purchase the property held under the description GRN 232, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur ("the property"). The purchase price for the property was RM4,451,160. The plaintiff's solicitors conducted a private search at the second defendant's office on 18 September 2007 which showed that the first defendant was the registered proprietor of the property. The plaintiff paid RM89,023.20 to the first defendant's solicitors as earnest deposit and subsequently entered into a sale and purchase agreement on 8 October 2007 to purchase the property. The plaintiff then made the balance payments.

[4] The memorandum of transfer and other documents to effect the transfer and charge of the property was presented to the second defendant's office for registration on 11 February 2008. Whilst registration was pending, the plaintiff came to find out that the property was in fact held under the description of PN 20992, Lot 349, Bandar Kuala Lumpur and was registered to a person named Mohamad Nor bin Mohamad.

[5] The plaintiff's solicitors again conducted searches of the land title to the property at the second defendant's office on 4 June 2008 and the results showed that the land held under title GRN 232, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur was registered in the name of the first defendant. However, it was also discovered that the same land, but held under different title number PN 20992, Lot 349, Bandar Kuala Lumpur was registered under the name of one Mohamad Nor bin Mohamad.

[6] The plaintiff alleged that the second defendant breached their duty of care to the plaintiff by misrepresenting the true and actual particulars of the property. Further, the plaintiff alleged that the second defendant failed to maintain true and accurate records. The plaintiff relied on the information provided by the second defendant and as a result, suffered losses. On that premise, the plaintiff claimed damages in tort of negligence with interest thereon and costs against the second and third defendants.

[7] The second and third defendants denied the whole of the plaintiff's claim and put the plaintiff to strict proof. The second and third defendants maintained that there was no duty of care owed to the plaintiff and that the information was accurate according to the second defendant's records at the time it was provided for. The second and third defendants also asserted that the plaintiff was not entitled to the reliefs sought.

The Question For Determination Of This Court

[8] Leave to appeal was given to the second and third defendants on the following question of law:

> In an action for negligence premised on the cause of action of the failure on the part of the Land Administrator to ensure the particulars in the Register of Titles are accurate, is the difference between sections 384 and 385 of the National Land Code of any relevance?

Findings Of The High Court

[9] The High Court gave judgment in favour of the plaintiff on his claim for damages premised on the tort of negligence and breach of statutory duty on the part of the second defendant. It was the High Court's finding that the second defendant failed to ensure at all times that the particulars of the land, as per its registered records and furnished to the plaintiff in exchange for a payment of fee, contained accurate details of the land to be relied upon by the plaintiff.

[10] On the contention of the defendant as to the supposed difference between a "private search" and an "official search", the learned High Court Judge took the view that since there was no plea on this issue in the defence put up by the second and third defendants, this issue must fail.

[11] The learned High Court Judge also stated that there is no difference between a "private search" and an "official search" insofar as the second and third defendants' duty of care to a paying member of the public is concerned because the object of a search, be it "private search" or "official search", is the same. The object is for the person requisitioning the search or on whose behalf the search is made to ascertain the true and actual description of the title to the land as well as to obtain the correct and accurate information as to the identity of the registered proprietor of the land. This is to enable a would-be-purchaser to rely on such information in order to make an informed decision relating to the land in particular, whether or not to purchase the land.

Findings Of The Court Of Appeal

[12] The Court of Appeal affirmed the decision of the High Court. The Court of Appeal having addressed itself on the parties' pleaded causes of action and the factual circumstances of the case, held that the contention of

the second and third defendants that they owed no duty of care to the plaintiff was without merit. On the supposed difference as between a "private search" and an "official search" raised by the plaintiff, the Court of Appeal had this to say:

> The apparent difference between sections 384 and 385 of the National Land Code are of little relevance particularly since the cause of action is not the accuracy of what is printed on the 'carian Persendirian' and the 'Carian Rasmi' but the failure to ensure that the particulars in the register of title are accurate and that it could not possibly be held to be even arguably correct when for the same piece of title there are two sets of record, each with a different person registered as the registered proprietor.

Submissions Of The Second And The Third Defendants

[13] Learned Senior Federal Counsel for the second and third defendants submitted that to answer the question posed before this court, it is necessary that we examine the following statutory provisions in the National Land Code ("the NLC").

> 384. Private searches
>
> Any person or body may, at any time during normal office hours of any Registry or Land Office, but subject to payment of the prescribed fee and such other conditions (if any) as may be prescribed, inspect and take notes of or extracts from:
>
> (a) any register of title, Presentation Book or Correction Notebook maintained by the Registrar or any predecessor in office; and
>
> (b) any instrument of dealing or application presented or made to, or in the custody of, the Registrar.
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> 385. Official searches
>
> (1) Any person or body may apply to the Registrar for an official search in respect of any land.
>
> (2) Any such application shall be accompanied by the prescribed fee, and the Registrar shall, as soon as may be after the receipt thereof, issue to the applicant a certificate of search under his hand and seal:
>
> (a) specifying the person or body for the time being registered as proprietor of the land, and, if he is registered as such as trustee or as representative, indicating that face;
>
> (b) …
>
> 386. Compensation
>
> Any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage by reason of any error in, or omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434.

[14] It was submitted for the second and third defendants that s. 384 of the NLC refers to a private search conducted by a person upon the payment of a prescribed fee. The information provided by the second defendant in a private search contains information which is gleaned from the second defendant's land database system. This information is merely an extract and is not accompanied by a certificate of search issued under the hand and seal of the second defendant.

[15] Section 385 of the NLC on the other hand, refers to an "official search" conducted by a person upon payment of a prescribed fee. The second defendant provides a certificate of search under his hand and seal giving particulars relating to the property in question.

[16] It was further submitted for the second and third defendants that s. 386 of the NLC renders the second defendant liable to compensate a person who suffered loss or damage because of an error or omission in a certificate of search. A certificate of search is only issued for an official search. The statutory framework on searches is silent on the recourse for a person who suffered loss or damage because of an error or omission for a private search.

[17] The plaintiff's allegations of misrepresentation and inaccuracy of records are founded on the private search that he conducted on the property. It is the contention of the second and third defendants that to decide on the question of misrepresentation and inaccuracy, the courts have to take cognisance of the fact that the misrepresentation and/or inaccuracy pertains to information provided for in a private search. This in turn requires the court to consider whether the second and third defendants are liable for information provided in a private search. It is for this very reason that the distinction between private and official searches and the provisions of ss. 384 and 385 of the NLC become relevant. The court must consider the nature of search the plaintiff conducted to decide whether the second defendant owed the plaintiff a duty of care.

[18] In the present case, the trial judge and the Court of Appeal both held that the second defendant owed the plaintiff a duty of care to provide a true and accurate information in a private search. To the second defendant, that cannot be so as that would impose a very heavy and burdensome duty on the second defendant. More so, the second defendant has no means of determining the object or the purpose behind the requisition of the private search.

[19] The second and third defendants maintain that the imposition of a duty of care on the second defendant only comes into being when the plaintiff submitted a request for, and obtained an "official search" which is certified by the second defendant. The signature and seal of the second defendant on the certificate of search would denote the emergence of his duty of care, and

the risk of the second defendant being penalised by the NLC with culpability for payment of compensation in the event that there is a loss or damage suffered by reason of any error or omission in the certificate.

[20] In its pleaded defence, the second and third defendants also contended that they are not liable by virtue of the protection accorded to its officers in the conduct of their duties under s. 22 of the NLC.

Submissions Of The Plaintiff

[21] Learned counsel for the plaintiff, amongst others, submitted that the decision of the High Court and affirmed by the Court of Appeal, hinges essentially on the finding of facts based on the documentary evidence and the oral evidence of the witnesses called by the plaintiff and by the second defendant. The second defendant is charged with a statutory duty under the NLC to maintain a register of all lands caused to be registered at its Land Registry and this constituted as an agreed fact at the trial before the judge at the High Court.

[22] It is the plaintiff's contention that the particulars of information recorded in the Land Registry of the second defendant is a representation that such information as recorded are accurate and reliable to a paying public and would be purchasers of any piece of land to which such information relates. Learned counsel for the plaintiff submitted that based on the evidence in its entirety, oral and by way of documents, there was a serious dereliction of duty by the second defendant in the maintenance of its records.

[23] As regards the supposed difference as between a "private search" and an "official search" as contended by the second defendant, learned counsel for the plaintiff submitted that it is of no relevance to the plaintiff's case. There is nothing in either s. 384 or s. 385 of the NLC which excludes the liability of the second defendant for negligence in its maintenance of its records of the Register of Titles.

Decision Of This Court

[24] The plaintiff's claim against the second and third defendants is for damages premised on the tort of negligence and breach of statutory duty on the part of the second defendant. The particulars of negligence as pleaded by the plaintiff were that the second defendant failed to ensure that the particulars of the land as per its registered records are at all times accurate and could be relied upon by the plaintiff. It was the plaintiff's case that the second defendant was maintaining entries in respect of particulars of land registered with it which are inconsistent, contradictory and to the detriment of the plaintiff. As a member of the public, the plaintiff is entitled to be provided with information which are true or correct on a search conducted with the Registry of the second defendant upon payment of a fee.

[25] It is our judgment based on the evidence adduced before the learned judge of the High Court the plaintiff had on balance of probabilities proven his case against the first and second defendants. It is noted that when the plaintiff's solicitors conducted a private search at the second defendant's registry on 18 September 2007 the first defendant, Ng Lai Yin was shown as the registered proprietor of the said property held under Land Title Number GRN 232, and the date of the said registration was 4 June 1989. However, on 4 June 2008 the registered proprietor of the property as shown on the records of the second defendant's registry was a person by the name of Mohamed Nor bin Mohamad. The date of the said registration was given as 18 March 1996 under the Land Title No. PN 20992.

[26] The indisputable fact is that the very same piece of land appears registered in the records of the second defendant under two different title numbers and two different names. This clearly points to the case of the failure on the part of the second defendant to ensure that the particulars of the Register of Title as maintained by the second defendant are accurate. As correctly noted by the High Court and the Court of Appeal this fact is the *causa causan* of the plaintiff's case against the second and the third defendants.

[27] The second defendant's witness DW1 in his evidence stated that the Land Title No. GRN 232 had been wrongly created in the year 2006 by an unknown third party. It is also in the evidence of DW 1 that he did not know how the unknown third party was able to create the fake or fraudulent title in the data base of the computer system of registration in the office of the second defendant. However, in his cross-examination DW1 admitted that what had transpired in the instant case was the responsibility of the second defendant, even though it was an unknown third party which had caused the creation of the fake or fraudulent title in 2006 because the registration of the particulars in the second defendant's records was the responsibility of the second defendant.

[28] On the unequivocal admission of the second defendant through its witness DW1 above, we are of the view that there has been a breach of the statutory duty imposed on the second defendant and its negligence in the manner in which it had maintained its record resulting in the loss occasioned to the plaintiff.

[29] On the defence of the second and third defendants to the plaintiff's claim, reliance was placed on the provision of s. 22 of the NLC which provides for protection of officers and reads as follows:

> No officer appointed under this Part shall be liable to be sued in any Civil Court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[30] We agree with the finding of the Court of Appeal that the intended protection under s. 22 of the NLC is for a wholly different set of circumstances. The existence of two sets of record of title under two different persons as the registered owners of the same property without reasonable explanation definitely will not qualify to be an act done in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under the Act.

[31] We are of the considered view that the duty of care on the part of the second and the third defendants in the context of the present case is two-fold. Firstly, there is the statutory duty under the NLC to maintain the register of all lands caused to be registered at the Registry, and in particular to ensure that the information contained in the Register is correct, true and accurate and reflects the true and actual description of the title to the land as well as the true identity of the registered proprietor thereof. Secondly, there is the common law duty of care whereupon there can be a claim for negligence for the same alleged wrong.

[32] We would also state here that there is a clear distinction between a claim for compensation provided for under s. 386 of the NLC, and a claim for damages under the common law, for an act of negligence by the second defendant in its maintenance of the records of the Register of Titles.

[33] We noted that in the present case, the plaintiff's claim in the matter is simply for damages under the common law and not a relief sought for compensation under s. 386 of the NLC. It is our judgment that the learned High Court Judge was right in arriving at a decision that the second defendant was liable and owed a duty of care to the plaintiff in the circumstances of the case.

[34] On the issue of liability for the negligent act of the second defendant, we would refer to the decision of the House of Lords in the case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 wherein their Lordships, *inter alia*, held that liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. Likewise, in the present case, the High Court having observed that there were two documents of title issued for the same piece of land had found that the second defendant was liable for negligence and breached its statutory duty to the plaintiff. The plaintiff had relied and acted, to his detriment, on the the records maintained by the second defendant.

[35] In the local case of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271 the High Court, *inter alia*, found that the Land Administrator, as in the present case, owed a duty of care to ensure that when searches are made by members of the public at the Land Registry they would be acting on accurate information and a properly

maintained and accurate Register of Titles. It was held in *Uptown Properties* that the conduct of the officers showed a failure to carry out their functions correctly and can hardly be construed to have carried out their duties in good faith. We adopt the reasonings of the learned judge in *Uptown Properties* and would further state here that administrative shortcomings amounting to negligence and breach of duty cannot absolve the Land Administrator from a claim of damages suffered by an aggrieved party who relied on the accuracy of the records maintained at the Land Registry.

[36] In the High Court case of *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755, Harmindar Singh J (as he then was) when observing that there were two documents of title issued for the same piece of land, found the Land Administrator liable in negligence and for breach of statutory duty.

[37] We would like to state here that a common law duty of care can arise in the performance of a statutory function. In the instant case, the second defendant had a statutory function to ensure that the records entered in the Register of Titles and maintained in the office of the second defendant contained particulars which are accurate. A failure of that duty can give rise to the coexistence of statutory duty and common law duty of care. (See the case of *X (Minors) v. Bedfordshire County Council* [1995] 3 WLR 152).

[38] As regards the sole leave question posed before this court, we agree with the finding of the Court of Appeal that it is of little relevance considering the fact that the plaintiff's cause of action was not premised on any search, be it private or official. The complaint of the plaintiff is against the second defendant's failure to ensure that the particulars in the Register of Titles maintained by the second defendant are accurate and can be relied upon by the plaintiff.

[39] We are of the view that there can be no difference as between a "private search" and an "official search", as provided for under the NLC, insofar as it relates to the issue of liability arising from a common law claim of damages for the negligent act of the second defendant in its maintenance of the records of Register of Titles. It is also noted that there is nothing in either s. 384 or s. 385 of NLC which excludes the liability of the second defendant from a common law claim of the tort of negligence.

Conclusion

[40] For the reasons abovestated, we do not think that it is necessary for us to answer the question posed. We find no merit in this appeal. The appeal is therefore dismissed with costs.